DHANESHVARAN S BASKARAN & ORS v. SINGAPORE AIRLINES LTD

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL APPEAL NO: BA-12ANCVC-58-04-2021]
29 DECEMBER 2021

Abstract – *The Sessions Court, as well as the solicitors for both the plaintiff and the defendants, had overlooked the impact of the conflict of laws in the context of a foreign company suing in the Malaysian court a person resident in Malaysia under a contract which has an express term that a foreign law of contract shall apply to the contractual relationship between the parties. The oversight has led both parties to make submissions based on the Malaysian law of contract which culminated in a decision of the subordinate court granting a summary judgment based on the Malaysian law of contract. As the legal basis for the decision to grant the summary judgment was erroneous, the summary judgment could not be sustained and ought to be set aside.*

CIVIL PROCEDURE: *Summary judgment – Appeal against – Contract between foreign company and person resident in Malaysia – Agreement contained clause that deed shall be governed by laws of Singapore – Whether dispute between parties ought to be submitted to non-exclusive jurisdiction of Singapore courts – Whether s. 75 of Contracts Act 1950 could be relied on – Whether rights and liabilities to be decided according to substantive law of contract of Singapore – Triable issues – Whether arose – Whether fit and proper case for granting summary judgment*

CONFLICT OF LAWS: *Contract – Terms of agreement – Agreement contained clause that deed shall be governed by laws of Singapore – Whether dispute between parties ought to be submitted to non-exclusive jurisdiction of Singapore courts – Whether s. 75 of Contracts Act 1950 could be relied on – Whether rights and liabilities to be decided according to substantive law of contract of Singapore*

The foreign plaintiff, Singapore Airlines Ltd, entered into a contract with the defendant, its ex-employee. The contract was described as Deed for a Course of Training ('Deed of Training'). In cl. 13 of the Deed of Training, the parties agreed that the deed shall be governed by the laws of Singapore. Although there was an express clause of the contract which stipulated that the dispute between the parties shall be submitted to the non-exclusive jurisdiction of the Singapore courts and the termination of the defendant-employee's employment contract occurred in Singapore, the defendant did not raise jurisdictional objection and, by virtue of O. 12 r. 10(6) of the Rules of Court 2012 ('RC'), the Malaysian courts were deemed to have jurisdiction over the

dispute in the present suit. In the Sessions Court, the plaintiff sued the defendants for the sum of S$78,094.83 being the balance of the amount outstanding. The plaintiff relied on s. 75 of the Malaysian Contracts Act 1950 and Malaysian decided cases in considering and/or deciding whether or not a summary judgment could be granted. In their statement of defence, the defendants pleaded, *inter alia*, that the defendants denied owing any amount to the plaintiff. The Sessions Court, however, granted summary judgment in favour of the plaintiff in the amount of S$78,894.93. The defendants hence appealed against the summary judgment granted by the Sessions Court.

Held (allowing appeal; setting aside summary judgment):

(1) In the premises, by operation of the provisions of O. 12 r. 10(6) of the RC, the parties were deemed to have submitted to the jurisdiction of the Malaysian courts and the Malaysian courts had jurisdiction over the subject matter of the present suit. However, the fact that Malaysian courts had jurisdiction over a contractual dispute between a foreign company and a legal entity resident in Malaysia does not necessarily mean that the Malaysian court will inevitably apply the Malaysian law of contract to decide the dispute between the parties. It depended on the express or implied terms of the contract or, in the absence of the express or implied terms of contract, the principles on conflict of laws. (paras 18 & 19)

(2) The rights and obligations of the parties herein under their contract have to be decided in accordance with the Singapore law of contract. Although the Malaysia court has jurisdiction in this case, the rights and liabilities of the parties under their contract have to be decided according to the substantive law of contract of Singapore. In exercising its jurisdiction to hear and decide the dispute between the contracting parties, the court does not re-write the terms of the contract between the parties including the term as to which substantive contract law is applicable to govern the parties' rights and obligations. (para 22)

(3) It was erroneous for the plaintiff and the Sessions Court to rely on s. 75 of the Malaysian Contracts Act 1950 and Malaysian decided cases in considering and/or deciding whether or not a summary judgment could be granted where the Singapore contract law was applicable. Under the laws of Malaysia, foreign law is a question of fact. In deciding the foreign law as a fact, the Malaysian courts may refer to law books or law reports published in that foreign country: s. 38 of the Evidence Act 1950. (paras 27 & 28)

(4) The plaintiff had not shown that under the Singapore contract law (which is a question of fact under the laws of Malaysia), the liquidated damages stated in the contract between the plaintiff and the first defendant was indisputably recoverable. As such, this was a fact in dispute which was triable and had to be dealt with by witnesses (namely, lawyers who are knowledgeable and qualified to give evidence on the Singapore contract law by reference to the law book and law reports published in that country) in a full trial. The plaintiff in its application for summary judgment and in its submissions in support thereof had not produced any affidavit of any lawyer who was knowledgeable and qualified to give evidence on the Singapore contract law or any law book or law report of Singapore in respect of the question of liquidated damages under the Singapore contract law. In the circumstances, this was not a fit and proper case for the court to grant summary judgment without a full trial. (paras 29-31)

(5) The Sessions Court erred in principle in applying the Malaysian contract law to the parties' contract which contained an express clause that the governing law is the law of Singapore. As the legal basis for deciding to grant the summary judgment was erroneous, the summary judgment could not be sustained and was hereby set aside. (paras 32 & 33)

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***

Denka Advantech Pte Ltd v. Seraya Energy Ltd [2020] SGCA 119 ***(refd)***

Dunlop Pneumatic Tyre Company, Limited v. New Garage And Motor Company, Limited [1915] AC 79 ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

United Overseas Bank Ltd v. United Securities Sdn Bhd (In Liquidation) & Ors [2021] 9 CLJ 593 CA ***(refd)***

World Triathlon Corporation v. SRS Sports Centre Sdn Bhd [2019] 1 CLJ 381 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75
Evidence Act 1950, s. 38
Rules of Court 2012, O. 12 r. 10(1), (6), O. 14

For the appellants - V Rajadevan; M/s Rajadevan & Assocs
For the respondent - Chia Peck Yun; M/s Zain & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Tee Geok Hock JC:

Introduction

[1] Conflict of laws, or private international law, is a field of law which
B is fraught with complexities and uncertainties, and which is seldom well-understood by the practitioners of law.

[2] This case is an example where the subordinate court as well as the solicitors for both parties overlooked the impact of the conflict of laws in the
C context of a foreign company suing in the Malaysian court a person resident in Malaysia under a contract which has an express term that the foreign law of contract shall apply to the contractual relationship between the parties. The oversight has led both parties' solicitors to make submissions based on the Malaysian law of contract which culminated in a decision of the subordinate court granting a summary judgment based on the Malaysian law
D of contract.

[3] On a fundamental point of law as to the applicable substantive contract law in a court suit involving a foreign company and a local resident, the court is not bound by the parties' error of law as to the applicability of the substantive law of contract.
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Background Facts

[4] The foreign plaintiff, Singapore Airlines Ltd, entered into a contract with the defendant, its ex-employee. The contract is described as deed for a course of training dated 21 February 2000 ("the deed of training').
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[5] Although there is an express clause of the contract which stipulated that the dispute between the parties shall be submitted to the non-exclusive jurisdiction of the Singapore courts and the termination of the defendant-employee's employment occurred in Singapore, the defendant herein did not raise jurisdictional objection and by virtue of O. 12 r. 10(6) of the Rules of
G Court 2012 ("ROC 2012") the Malaysian courts are deemed to have jurisdiction over the dispute in the present suit.

[6] In cl. 13 of the deed of training dated 21 February 2000, the parties agreed that the deed shall be governed by the laws of Singapore.

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The Suit In The Court Below

[7] In the Sessions Court below, the plaintiff sued the defendants for the sum of S$78,094.83 the balance amount outstanding.

[8] The said sum of S$78,094.83 is computed as follows:

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		S$ (Singapore Dollars)
1.	Liquidated Damages under clause 4 of the Deed of Training [paragraph 12 of Statement of Claim, "SOC"]	74,077.40
2.	Balance of training cost not yet recouped as per letter dated 15.1.2004	12,000.00
3.	Community chest	5.00
4.	Training fees	375.00
5.	Deduction for medical allowance	118.90
6.	Salary credited on 21.5.2009	5,914.59
7.	Total	**92,490.89**
8.	Less: salary payable to 1st Defendant from 1.5.2009 – 28.5.2009 (5,287.46) Less: MVC (587.49) Less: 4 days of leave (855.36)	**(6,730.31)**
9.	Total in item 7 – total in item 8	**85,760.58**
10.	Less: Instalment payments by the 1st Defendant	**(6,865.75)**
11.	Balance claim (item 9 – item 10): paragraph 17 of SOC	**78,894.93**

[9] In the statement of defence, the defendants pleaded *inter alia* that:

(i) The first defendant was wrongfully terminated by the plaintiff: para. 2;

(ii) The defendants deny owing any amount to the plaintiff: paras. 3 and 4;

(iii) The defendants deny the amounts claimed by the plaintiff: paras. 3, 4 and 5:

(iv) The second and third defendants deny there was any contract between them and the plaintiff: para. 6;

(v) The defendants aver that the plaintiff's claims are barred by Limitation Act 1953 and/or by laches: paras. 7 and 8.

[10] In the Sessions Court, the plaintiff applied for summary judgment under O. 14 of ROC 2012, and the Sessions Court granted summary judgment in favour of the plaintiff in the amount of S$78,894.93.

[11] In the Sessions Court proceeding, the plaintiff's counsel and the Sessions Court relied on s. 75 of the Malaysian Contracts Act 1950 and Malaysian decided cases of *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 6 MLJ 15 and similar Malaysian decided cases in considering and/or deciding whether or not summary judgment can be granted in the present case.

[12] The defendants appealed against the summary judgment granted by the Sessions Court.

[13] On 8 November 2021, this court held that there are defences and/or triable issues which ought to go for full trial and therefore this court allowed the appeal and set aside the summary judgment.

[14] Dissatisfied with the said decision on appeal, the plaintiff has applied to the Court of Appeal for leave to appeal to the Court of Appeal.

[15] Pursuant to para. 3(a) of the Circular No. 1 of 2021 of the Chief Judge of Malaya, the Court of Appeal has required this court to write the grounds of judgment before the Court of Appeal hears the leave application.

Jurisdiction And Governing Law

[16] Order 12 r. 10 of ROC 2012 provides for the procedure regarding any dispute of jurisdiction as follows:

> **Dispute as to jurisdiction (O. 12, r. 10)**
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> 10(1) A defendant who intends to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity as is mentioned in rule 9 or on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the Court for –
>
> (a) an order setting aside the writ or service of the writ on him;
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> (b) …;
>
> (c) …;
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> (d) …;
>
> (e) …;
>
> (f) …;
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> (g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action; or
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> (h) such other relief as may be appropriate.
>
> (2) A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to the Court for an order to stay the proceedings.

(3) …

(4) …

(5) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having entered an appearance and if the Court makes no order on the application or dismisses it, paragraph (6) shall apply as if the defendant had not made any such application.

(6) Except where the defendant makes an application in accordance with paragraph (1), the appearance by a defendant **shall**, unless the appearance is withdrawn by leave of the Court under Order 21, rule 1, **be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings.**

(7) … (emphasis added)

[17] In our present case, the defendants did not make any application under O. 12 r. 10(1) of ROC 2012 in spite of the lapse of many months after entering appearance in the Sessions Court suit.

[18] In the premises, by operation of the provisions of O. 12 r. 10(6) the parties are deemed to have submitted to the jurisdiction of the Malaysian courts and the Malaysian courts have jurisdiction over the subject matter of the present suit.

[19] However, the fact that Malaysian courts have jurisdiction over a contractual dispute between a foreign company and a legal entity resident in Malaysia does not necessarily mean that the Malaysian court will inevitably apply the Malaysian law of contract to decide the dispute between the parties. It depends on the express or implied terms of the contract or, in the absence of the express or implied terms of contract, the principles on conflict of laws.

[20] In *United Overseas Bank Ltd v. United Securities Sdn Bhd (In Liquidation) & Ors* [2021] 9 CLJ 593 the Malaysian Court of Appeal held that in a contract where the applicable contract law is expressly stipulated to be the laws of Singapore and the parties expressly agreed to submit to the non-exclusive jurisdiction of the Singapore courts, the Malaysian court when faced with an application for stay on ground of lack of jurisdiction should grant the stay although the opposite party relies on *forum non conveniens* to argue that the foreign forum is not convenient and suitable. In *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273, the Supreme Court held that in a case involving a foreign party where the Malaysian court has the jurisdiction, the Malaysian court still has the discretion to decline jurisdiction on ground of *forum non conveniens*. *American Express Bank* case involves an agreement where both parties agreed to submit to the jurisdiction of the Singapore court and be governed by the laws of Singapore and where

A the Supreme Court held that Singapore is the most suitable forum to try the action. In *World Triathlon Corporation v. SRS Sports Centre Sdn Bhd* [2019] 1 CLJ 381, the Court of Appeal in a case where the parties agreed to a foreign jurisdiction clause as well as to be governed by the laws of Florida/USA granted a stay of the Malaysian action on ground of *forum non conveniens* B primarily by reason of the fact that the contract law of Florida/USA might be different from the contract law of Malaysia and that the Florida court is in the best position to decide on the contract law of Florida/USA.

[21] The underlying principle common to all the above-mentioned decisions of the appellate courts is that where the contracting parties agree C to be governed by the foreign law of contract, the Malaysian court has to decide the contractual rights and obligations of the contracting parties according to that foreign contract law even if the Malaysian court were to exercise jurisdiction to hear and decide the case. Choice of forum does not deviate from the choice of applicable substantive law (ie, contract law) which D the contracting parties have agreed upon.

[22] As such, the rights and obligations of the parties in our present case under their contract have to be decided in accordance with the Singapore law of contract. Although the Malaysia court has jurisdiction in this case, the rights and liabilities of the parties under their contract have to be decided E according to the substantive law of contract of Singapore. In exercising its jurisdiction to hear and decide the dispute between the contracting parties, the court does not re-write the terms of the contract between the parties including the term as to which substantive contract law is applicable to govern the parties' rights and obligations.

F **[23]** As the parties in our present case have submitted to the jurisdiction of the Malaysian courts and the present case has proceeded to the stage of interlocutory appeal, it is too late in the day to consider the question of *forum non conveniens* a ground for declining to exercise the jurisdiction. It is in the context of *forum non conveniens* that the court considers whether or not to G exercise or decline jurisdiction although the parties have submitted to the jurisdiction of the court.

[24] Singapore does not have codified contract law, and the Singapore contract law is based on judge-made law which is similar to the English contract law but is different from the Malaysian Contracts Act 1950. See, for H example, *Denka Advantech Pte Ltd v. Seraya Energy Ltd* [2020] SGCA 119 wherein the Singapore Court of Appeal applied the *Dunlop* test laid down by the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v. New Garage And Motor Company, Limited* [1915] AC 79.

I **[25]** In Singapore, there is also Unfair Contract Terms Act (Chapter 396) which has no corresponding statute in Malaysia.

[26] It is well-settled that in Malaysia s. 75 of the Malaysian Contracts Act 1950 has rendered it irrelevant to consider the *Dunlop* test when deciding on the liquidated damages under a contract: see *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817; case and *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 6 MLJ 15. In the premises, it seems reasonably clear or at least a triable issue that the law of liquidated damages under a contract is different in Malaysia and Singapore.

Findings And Decision Of This Court

[27] From the points discussed in paras. 16 to 27 above, it is erroneous for the plaintiff's counsel and the Sessions Court to rely on s. 75 of the Malaysian Contracts Act 1950 and Malaysian decided cases of *Cubic Electronic* and similar Malaysian decided cases in considering and/or deciding whether or not summary judgment can be granted in the present case where the Singapore contract law is applicable.

[28] Under the laws of Malaysia, foreign law is a question of fact. In deciding the foreign law as a fact, the Malaysian courts may refer to law books or law reports published in that foreign country: s. 38 of the Evidence Act 1950.

[29] In the present case, the plaintiff has not shown that under the Singapore contract law (which is a question of fact under the laws of Malaysia), the liquidated damages stated in the contract between the plaintiff and the first defendant is indisputably recoverable. As such, this is a fact in dispute which is triable and has to be dealt with by witnesses (namely, lawyers who are knowledgeable and qualified to give evidence on the Singapore contract law by reference to the law book and law reports published in that country) in a full trial.

[30] In our present case, the plaintiff in its application for summary judgment and in its submissions in support thereof has not produced any affidavit of any lawyer who is knowledgeable and qualified to give evidence on the Singapore contract law or any law book or law report of Singapore in respect of the question of liquidated damages under the Singapore contract law.

[31] In the circumstances, this is not a fit and proper case for the court to grant summary judgment without a full trial.

Conclusion

[32] In conclusion, this court held on 8 November 2021 that the Sessions Court erred in principle in applying the Malaysian contract law to the parties' contract which contains an express clause that the governing law is the law of Singapore.

[33] As the legal basis for deciding to grant the summary judgment is erroneous, the summary judgment cannot be sustained and is hereby set aside.

[34] This is especially wherein the present case, the plaintiff and the Sessions Court have not produced any relevant evidence on the Singapore law of contract regarding liquidated damages.

[35] In the premises, this court on 8 November 2021 allowed the defendants' appeal with costs and set aside the summary judgment. The defendants were granted leave to defend, and the case is remitted to the Sessions Court for full trial. Costs of application and appeal were assessed at RM4,000, subject to allocator.